# In the Supreme Court of the United States

**OCTOBER TERM, 1943.**

## No. . . . . .

HAROLD KRAMER,
*Petitioner,*

vs.

STATE OF OHIO,
*Respondent.*

## BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

The amendment to the State Dental Practice Act that became effective August 21, 1941, is in violation of Sections 1, 14 and 19 of Article I of the Constitution of the State of Ohio, and the Fifth and Fourteenth Amendments to the Constitution of the United States. The amendment is not established in the law for the purpose of protecting the health, morals or general welfare of the people, but has for its purpose the creation of a monopoly and the complete control by licensed dentists of the prices that the public must pay for work that is performed almost exclusively by tradesmen and manufacturers.

In the practice of dentistry, the manufacture and repair of dentures and false teeth is performed principally by expert tradesmen commonly known as dental technicians. These mechanics learn their trade, as did the defendant, by becoming apprenticed to a dental mechanic, and after a number of years of practice, progress into a full fledged mechanic.

In furnishing a set of false teeth to a patient, the following is the usual and customary practice. The licensed

dentist takes an impression of the patient's mouth with plaster-of-Paris. This impression is sent to the dental mechanic who uses it to make the cast from which is constructed the set of false teeth. The set of false teeth, when finished by the technician, is sent to the licensed dentist who adjusts it to the patient's mouth. Once the patient has secured his false denture, the repair of that false denture when it is cracked or broken, or when teeth are knocked out, is purely a mechanical operation. The duplication of a false denture is likewise a purely mechanical operation.

There are two classes of dental mechanics—those who work directly for the licensed dentist, and not for the general public; and others in which class this defendant falls, who advertise to the general public that they duplicate and repair false dentures.

Dental mechanics do not prescribe, take impressions or set the plate in the mouth of the patient. As the evidence discloses this defendant does none of these things. The work of this defendant and all dental mechanics is confined strictly to making false dentures on the prescription furnished by the licensed dentists, or after they have been so furnished to duplicate the plate or repair it when it is broken.

Section 1329 of the Ohio General Code, as amended in August, 1941, defines the practice of dentistry generally as being the acts of the professional, licensed practitioners; and includes, in and as the practice of dentistry, the mechanical work of a tradesman usually called a laboratory technician. This Section, however, excepts the mechanical work of the tradesman from the practice of dentistry if it is done on the prescription of a licensed dentist. The amendment does not prohibit advertising by the dental tradesman if the advertising is directed solely to licensed dentists.

If the mechanical work of making or repairing of false teeth is done on the prescription of a licensed dentist or if

the dental mechanic offers to sell to a licensed dentist, the dental mechanic is not practicing dentistry. The statute recognizes that false teeth, plates and repairs may be made by an unlicensed mechanic and that this unlicensed mechanic may advertise his wares but he can advertise them to but one class, that is: to licensed dentists.

The restriction set up by the amendment in no way changes the nature of the work performed by the dental mechanic. The purpose of the amendment, which confines the advertising of the dental mechanic solely to the licensed practitioner and which prevents the mechanic from doing repairs except on the prescription of a licensed dentist, is to prevent the dental mechanic from doing any business with the general public. This restriction establishes in the hands of the licensed dentists the price that the general public shall pay for work that is done by a mechanic, and places the mechanic completely and wholly within the control of the licensed practitioner.

This amendment places the general public completely at the mercy of the licensed practitioner, not for what they pay for professional service and advice, but for what they pay for work that is entirely mechanical and in most instances performed outside the licensed dentist's office. The evidence discloses as testified by the defendant on demurrer that seventy per cent (70%) of the dentists in greater Cleveland do not make dentures or repairs, but send this work out of their office to be done by dental mechanics; and in the State of Ohio, outside of Cleveland seventy-three per cent (73%) send their work to dental mechanics.

The vicious system of monopoly that is attempted by this enactment whereby the licensed dentist controls the prices that the public pay for repair and duplication of dental plates is shown by the following facts that appear in the Bill of Exceptions:

The average prices charged to the general public by the licensed dentist for the work performed by his mechanic, as compared with the prices charged to the public by the mechanic when he can deal directly with the public in matters of repairs are as follows:

For adding a single tooth to a rubber plate, the licensed dentist: $5.00. This defendant: 75¢.

For the duplication of a full denture, licensed dentist's price: $80.00. Defendant's price: $20.00.

For a fracture of a rubber denture, licensed dentist's price: $10.00. Defendant's price: $2.00 or $3.00.

For the duplication of a plastic denture, licensed dentist's price: $50.00 to $500.00. Defendant's price: $15.00.

For the fracture of a plastic denture, licensed dentist's charge: $10.00 to $15.00. Defendant's price: $4.00 to $5.00.

It is readily seen that the public is in for a terrific gouging through the operation of this law which compels them to go to a licensed dentist to secure a prescription before a mechanic can mend a plate; the law prevents the public from paying the mechanic for the repair to the plate, and compels them to pay a licensed dentist the charge that he fixes for this mechanical work.

The vicious system of monopoly that is attempted by the enactment of this amendment to the Dental Practice Act has been condemned by the medical profession, and certainly will be condemned by the public generally just as soon as they know about it.

On January 4, 1941, the American Medical Association held its Ninety-Second Annual Session in Cleveland, Ohio. Dr. Albert C. Snell, Chairman of the section on Ophthalmology, condemned as unethical certain questionable practices of ophthalmologists in dispensing eye glasses. After setting forth four methods of supplying glasses to the public, all of which are in line with ethical practice, he spoke of a fifth method. "One in which ophthalmologists

have a partial or complete ownership in an optical dispensing store, which at times is designated by the more subtle name of laboratory. By this method the ophthalmologist has a direct interest in the profits from sales connected with his prescriptions. The financial interest in such stores is generally not known to the patients who patronize such stores on advice of the ophthalmologist."

Condemning this practice we cull the following sentences from his address:

> Page 499. "The outright or partial interest in any retail optical store is an indirect method of receiving rebates, and the best ethical traditions of the profession are violated when ophthalmologists yield to this temptation to make a profit on ophthalmic supplies."
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> "It is a fundamental duty of the ophthalmologist to give his patients an unselfish, unbiased and unhampered service—the best advice which his experience and knowledge dictate. It is very questionable whether such service can be rendered without some degree of prejudice, perhaps unconsciously, by an ophthalmologist who has a financial interest in the commercial side of supplying the equipment. As far as refractive problems are concerned, patients consult the ophthalmologist not primarily to get a pair of lenses, but to find out whether or not there is need for them. * * *"
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> "* * * As a consequence of this method of practice, patients are compelled to pay for services which are not rendered either by the ophthalmologist or by the optician. Evidently this practice does not consider the best interest of the patient."
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> "When an adequate and proper fee is made for the professional services rendered, the ophthalmologist is not ethically entitled to some additional fee from the sale of the glasses. * * *"

This speech appears in the issue of the Journal of the American Medical Association for August 16, 1941.

The amendment to the Dental Practice Act, instead of protecting the people against unethical practices, brings into the practice of dentistry the evils that Dr. Snell condemns in the practice of ophthalmology.

In numerous instances the professional man relies upon the work of tradesmen and manufacturers for aid or the completion of his treatment. As noted in the address quoted, ophthalmologists, after determining that a patient needs glasses, rely upon the optician to supply the lenses. Surgeons and physicians, in increasing numbers, rely on tradesmen and manufacturers to supply their patients with braces, shoes, corsets, arch supports, sacro-iliac and various kinds of body support, wooden legs, glass eyes, crutches, abdominal bandages, hearing aids, trusses, therapeutic electric lamps, etc.

Rather recent discoveries made by the medical profession in aiding the deaf or hard of hearing has resulted in extensive manufacturing of hearing aids by companies both large and small who solicit public patronage through advertising.

The extension of the idea that is in this amendment to the Dental Practice Act of Ohio, and which confines the sale of mechanical work solely to licensed dentists, might bring us to the time when the possession of a license would result in the control by the licensee of what the public will have to pay for a variety of related services.

All professions and a number of trades and occupations are now licensed, such as barbers, manicurists, beauty parlor operators, who have the high sounding name of Cosmetologist. If the licensed dentists are successful in retaining control of the dental technicians, the result may well be that the legislature may pass similar laws to control other groups for the benefit of the holder of a license.

The amendment also deprives the defendant of the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Before the introduction of the testimony and in support of the demurrer that was filed there was introduced Exhibits 1 to 11, showing advertising that appears in nationally circulated magazines through which dental mechanics seek the patronage of the public of Ohio; and while the advertising is to the public in Ohio for repair work on false dentures, the repair work is done outside of the State of Ohio. Such advertising is not and cannot be reached by the statute under consideration, and while craftsmen outside of the State of Ohio can advertise their craft within the state, this law prevents the citizen of the State of Ohio, because he performs his work inside the state, from advertising. Thus this amendment deprives the defendant of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

While it is well settled that legislative action may be taken to prohibit an occupation that is harmful to the public, and proper regulatory measures may be passed confining the practice of any profession or occupation within certain boundaries for the purpose of protecting the public, a state cannot under the guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them, or create a monopoly. The Ohio rule is set forth in the case of *State of Ohio vs. Boone*, 84 Ohio St. The following is from page 351 of that Opinion:

> "The police power is inherent in sovereignty; and its exercise is justified by the necessity of the occasion. Its foundation is the right and duty of the government to provide for the common welfare of the governed. It is tersely expressed in the maxim, '*Salus Populi suprema lex.*' While, therefore, a broad discretion is given to the legislature to provide for the general welfare, it, necessarily, is not an arbitrary or unlimited dis-

cretion; for if it were beyond judicial control or review, it would amount to a practical abrogation of all constitutional guaranties of personal rights and the undefined boundaries of legislative despotism conducted in the name of the people. Hence it has been held not only in this state, but in a great number of cases both in the federal and state courts that it is within the judicial power to declare void an unnecessary or unreasonable exercise of police power. This rule was approved and applied in *Phillips vs. State*, 77 Ohio St., 214, 'To justify the state in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under guise of protecting, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination of what is a proper exercise of the police power is not final or conclusive, but is subject to the supervision of the courts.' *Lawton vs. Steele*, 152 U. S. 133. See also numerous cases cited in 22 *Am. & Eng. Enc. Law* (2 ed.) 939."

As authority for granting this petition we submit the following cases:

*Peter Mugler v. State of Kansas*, 123 U. S. Sup. Ct. Rep. 661:

> "Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.
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> It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which

legislation cannot rightfully go. While every possible presumption is to be induged in favor of the validity of a statute, *Sinking Fund Cases,* 99 U. S. 718 (25: 501), the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in *Marbury v. Madison,* 5 U. S. 1 Cranch, 137, 167 (2: 60, 70), 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.''

*Adair v. United States,* 208 U. S. Sup. Ct. Rep. 173 and 174:

''The right to purchase or to sell labor is part of the liberty protected by this Amendment, unless there are circumstances which exclude the right. There are, however, certain powers existing in the sovereignty of each state in the Union, somewhat vaguely termed 'police powers,' the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such rea-

sonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Re Converse*, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191. * * * In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interfrence with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor. Although there was a difference of opinion in that case among the members of the court as to certain propositions, there was no disagreement as to the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation. The minority were of opinion that the business referred to in the New York statute was such as to require regulation, and that, as the statute was not shown plainly and palpably to have imposed an unreasonable restraint upon freedom of contract, it should be regarded by the courts as a valid exercise of the state's power to care for the health and safety of its people.

While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept

or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it."

*Meyer vs. Nebraska,* 262 U. S. Sup. Ct. Rep. 390:

Syllabus 1. "The liberty guaranteed by the 14th Amendment to the Federal Constitution denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Syllabus 2. "The liberty protected by the 14th Amendment to the Federal Constitution may not be interfered with, under the guise of protecting the public interests, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."

Syllabus 3. "Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts."

*Jay Burns Baking Co. v. Charles W. Bryan, etc.,* 264 U. S. Sup. Ct. Rep. 504-534:

Syllabus 1. "A state may not, in the guise of protection of the public, arbitrarily interfere with private business, or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions upon them."

Courts—duty to determine reasonableness of statute.

Syllabus 2. "The court must, when constitutional protection from state legislation respecting the weight of loaves of bread is invoked, determine whether or not the challenged provision has reasonable relation

to the protection of purchasers of bread against fraud by short weights, and really tends to accomplish the purpose for which it was intended."

*Norfolk & Western Railway Co. v. Public Service Commission of West Virginia,* 265 U. S. Sup. Ct. Rep. 70-75:

Syllabus 2. "When the validity of measures adopted by a state legislature for the regulation of facilities provided by railroad companies for the convenience of communities served by them is challenged on the ground that they violate the Constitution, it becomes the duty of the court to determine whether, in the light of the facts, the regulation is reasonable and valid, or essentially unreasonable, arbitrary, and void."

*Walter M. Pierce, etc. v. Society of Sisters, etc.,* 268 U. S. Sup. Rep. 510:

Syllabus 1. "Requiring all children between the ages of eight and sixteen years to attend the public schools unconstitutionally interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."

Syllabus 2. "That the owners of private schools whose business and property will be destroyed by the enforcement of a statute requiring all children to attend public schools are corporations does not prevent the granting of relief against such enforcement as an interference with constitutional rights."

*D. E. Weaver, etc. v. Palmer Brothers Co.,* 270 U. S. Sup. Ct. Rep. 402-416:

Syllabus 1. "Legislative determination, express or implied, are entitled to great weight, but it is always open to interested persons to show that the legislature has transgressed the limits of its power."

*Fairmont Creamery Co. v. State of Minnesota,* 274 U. S. Sup. Ct. Rep. 1:

Syllabus 1. "A state statute, forbidding, under penalty, creameries to purchase cream at higher prices in one locality than in other localities, after allowance

for the difference in cost of transportation, is unconstitutional as impairing the private right of freedom of contract guaranteed by the 14th Amendment to the Federal Constitution, although the high bidding of strong buyers tends toward monopoly, since the statute has no reasonable relation to such bidding, previously regarded as beneficial to the public."

*Liggett vs. Baldridge,* 278 U. S. Sup. Ct. Rep., 105:

Syllabus 4. "The police power may be exerted in the form of state legislation where otherwise the effect would be to invade rights, guaranteed by the Federal Constitution only where the legislation bears a real and substantial relation to the public health, safety, morals or some other phase of the general welfare."

Respectfully submitted,

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